In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

CHARLES PEYTON WEST and MAURICE JOHN WEST,
Petitioners,

vs.

THE AMERICAN TELEPHONE AND TELEGRAPH CO.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS.

The opinion of the Ohio Court of Appeals in the state case, is found in 54 Ohio Appellate Reports, 369, and also on p. 71 of the Record.

The Opinion of the United States District Court is found on p. 116 of the Record, and the court's findings of fact and conclusions of law on p. 121 of the Record.

The first Opinion of the United States Circuit Court of Appeals is reported in 108 Fed. (2nd) 347, and on p. 136 of the Record.

The Opinion of this Court is reported in 311 U. S. 223.

The second Opinion of the United States Circuit of Appeals is found in the Record, but at this writing has not been published in the Federal Reporter.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended. (28 U. S. C. A. Section 347.)

The judgment of the Circuit Court of Appeals was entered on June 25, 1941.

ARGUMENT.

The facts under consideration are pleaded in the petition for the Writ of Certiorari, and are not repeated here.

I. The decision of the Circuit Court of Appeals that by the law of Massachusetts the tortious sale of personal property by a life tenant, without authority, does not terminate the life estate and accelerate the remainder, is in direct conflict with the settled law of Massachusetts, and is erroneous.

In *Phillips v. Allen* (1863), 89 Mass. 115, *a life tenant* of a farm cut standing trees on the farm and then sold them. When the remainderman discovered this, he filed *an accounting action in equity* to recover the value of the trees as of the time when they were sold. In response to the complaint of the plaintiff, the defendant pleaded the following defenses—

(a) That defendant was not liable for interest on the value of the trees;

(b) That she had to buy wood from others for fuel, and the value of the wood so bought should on the theory of her right to estovers, be set off against the value of the trees which she had cut and sold; and

(c) That since the time the trees were cut, there was a new growth which should be set off against the value of the trees cut and sold.

The court expresses its views on these defenses on page 116 of the opinion, holding all rights in the trees accelerated to the remainderman at the time they were severed—

> "The wood and timber when severed at once became the property of the plaintiff, as the person holding the estate in remainder. * * * In analogy to cases of conversion of personal property, it would be proper to add interest on the value of the wood and timber from the

time it was unlawfully taken by the defendant. It is true that the plaintiff had no right to the standing trees, or any profits arising therefrom, during the continuance of the life estate, and it is only by the illegal acts of the tenant for life that any such claim exists. But by such acts the right to the timber and wood thus cut vested at once in the plaintiff, and to the amount in value of this property the ordinary interest should be added in assessing the damages to the present time."

In *Leonard v. Stickney* (1881), 131 Mass. 541, the vendor of land remained on the premises sold, for a period agreed on between him and his vendee, as tenant of the vendee. During the period of tenancy, the vendor removed certain fixtures from the premises which were part of the realty. The vendee immediately filed replevin to recover possession of such fixtures. The vendor-tenant pleaded she had the right to use the fixtures during the period of her tenancy and therefore replevin could not lie until the right to possession had inured to the vendee-lessor at the termination of the period of the tenancy. But the highest court of Massachusetts held that the vendor-tenant's right to possession and use of the fixtures terminated and accelerated to the vendee immediately at their removal. On p. 545 of the opinion, the court cites and follows *Phillips v. Allen, supra,* and then announces the following rule—

"By the illegal act of the tenant for life, the remainderman is invested with the right to property to which otherwise he would have no claim except at the termination of the tenancy. * * * Where one violates the terms of a bailment of personal property, by removing it from the place where alone he was entitled to use it, or by selling it, the rule is similar. His wrongful act terminates his possession, and the bailor has a right to it immediately. * * * The defendant was the tenant of the plaintiff. Articles which were part of the realty were let to her for use on the premises during the term. If by her wrongful act she separated them, they became at once the personal property of the landlord, and all right of the wrongdoer ceased therein."

It is thus seen that the supreme judicial court of the State of Massachusetts applies the same rule to bailments, tenancies for years, and *tenancies for life*. On his conversion of the property the limited holder's rights in the property terminate and the expectant estate accelerates, and it is so held both in actions at law and in equity.

In *United Shoe Machinery Co. v. Holt* (1904), 185 Mass. 97, machinery was leased by plaintiff to defendant for the life of the patent issued thereon; defendant sold the machines without authority during the term of the lease. The court states the legal result of such conversion in syllabus 3—

> "Where a bailee of goods sells the property outright, without authority to do so, the bailment is ended, and the general owner has a right to immediate possession, on which he can maintain trover or equitable replevin."

United Shoe Machinery Co. v. Holt, supra, is cited with approval in *Potier v. Perry, Inc.*, 286 Mass. 602, at p. 608, decided in 1934. See, also, *Noyes v. Stone* (1895) 163 Mass. 490, for similar conclusion.

It would appear that a rule so definitely announced should not be misinterpreted.

The Circuit Court of Appeals assumes to state categorically that the above cases differ from the instant case, but fails to show in which particulars they do differ. Quite obviously stocks are the same sort of property as machinery and logs.

Indeed the above cases declare not only the Massachusetts rule, but the universal rule. *Tabb's Curator v. Cabell* (1867), 58 Va. 160; *Burwell v. Burwell's Guardian* (1884) 78 Va. 574; *Coffee v. Wilkerson* (1858) 58 Ky. 101; *Yeager v. Bank* (1894) 127 Ky. 751 (a corporate stock case); *Hercules Powder Co. v. Rowan* (1924) 245 Ill. App. 291.

But the Circuit Court of Appeals refers in its opinion to Section 9 of Chapter 184 of the Massachusetts Code as applicable to corporate stocks. This section provides—

> "A conveyance by a tenant for life or years which purports to grant a greater estate than he possesses or can lawfully convey shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such grantor can lawfully convey."

It will be noted that Chapter 184 of the Massachusetts Code, wherein this section appears, is headed—

> *"General Provisions Relative to Real Property."*

And its very phraseology makes it apply only to real property, and not to personal property at all.

This statute was doubtless enacted to abrogate the English common law rule applicable to real estate followed in *Commonwealth v. Welcome*, an early Massachusetts case reported in 5 *Dane's Abridgment of American Law*, p. 13, where a life tenant purported to convey a fee simple, and it was held—

> "* * * by his conveying an estate in fee, he destroys, and annihilates his own life estate; it ceases to exist, is thus put out of the way and is ended; and then the entry of him next in remainder or reversion, accrues, as it always does, when the life estate next preceding is terminated."

That the statute quoted is by its express terms applicable to real property only, is so obvious as to make further comment superfluous; and the Circuit Court of Appeals unquestionably erred in applying it to personal property.

Nor can a statute which abrogates a common law rule, be extended by implication. For a Statute—

> "* * * is not to be construed as altering the common law farther than the language of the statute clearly and necessarily requires." 25 *R. C. L.*, Sec. 281.

II. The Circuit Court of Appeals declares in its opinion that to accelerate the remainder—

> "* * * would amount to a forfeiture of the life estate, which is forbidden by the statute [above Massachusetts statute] and by the principles of equity, for it is axiomatic that equity does not favor forfeitures. *Marshall v. Vicksburg*, 15 Wallace 146, 149. Since the plaintiffs have seen fit to file a bill for equitable relief, they cannot complain that equitable principles are applied against them."

This statement, it is respectfully submitted, completely, and almost naively, misconceives the equitable principles adverted to, which are variously stated as, "Equity Abhors a Forfeiture," or "Equity Will Not Enforce a Forfeiture," or "Equity Will Relieve Against a Penalty or a Forfeiture."

Needless to say, in English Chancery the strict exactions of the common law were relieved against in order to promote the ends of justice, conformably to the maxim that "equity looks to the intent rather than the form." 1 *Pomeroy's Equity Jur.* (4th Ed.) Sec. 381.

But this principle has never been applied where the bad faith or voluntary acts of a party *ipso facto* repudiate and terminate a property right. Some of the cases cited above in this brief where the life tenant was held to have extinguished and thus terminated his life estate by his own tortious sale, were in fact chancery cases. Thus, in this regard, no distinction has been made between law cases and chancery cases.

The equitable doctrine against forfeitures is applied where a party to a contract, or lease, or mortgage, or other instrument, does not make strict performance on account of oppression, accident, fraud, surprise, ignorance. It cannot be applied to relieve against the consequences of wilful acts, or breach of faith. 10 *R. C. L.*, pp. 328 to 333.

In *Big Six Development Co. v. Mitchell* (1905) 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332, a case in

the Eighth Circuit in which this Court denied Certiorari, it was sought to cancel a lease on the ground that lessee had terminated the lease by voluntary violation of its terms, and to enjoin the lessee's continuing trespass on the property.

The court says on p. 284:

> "It is also urged that the bill cannot be maintained because it is a bill to enforce a forfeiture, and equity never lends its aid to enforce a forfeiture or penalty. But as we understand it, the theory of the bill is not that, but is that the forfeiture was complete before the bill was filed, that the lease was dead, and that the defendant was threatening and was guilty of a continuing trespass."

Thus it is obvious that *that case is in exact conflict with the case at bar.*

Would a court of equity refuse to recognize an accelerrated remainder where the life tenant elected not to take the life estate? The consequence is the same in both cases. *In legal contemplation the life tenant is dead.*

Albert M. Kales says in *Future Interests* (2nd Ed.) Sec. 599:

> "If the interests created are to A for life and *'at A's death'* then to B, by a long course of construction * * * 'at A's death' means 'at the termination of A's life estate, *whenever and however that may occur'*." (Latter italics ours.)

III. The Circuit Court of Appeals thought it was bound by the dictum of two of the three judges of the Ohio Court of Appeals that the case was governed by *Carpenter v. Denoon* (1876), 29 O. S. 379, a real property case.

There are several fallacies in this position.

The Circuit Court of Appeals does not expressly hold that the law of Ohio applies. This, however, is necessarily implied. For the court says:

> "We think it is unnecessary to discuss further the question of acceleration of the remainder interests, because upon this point we are bound (311 U. S. 223) by the declarations of the Ohio Court of Appeals."

Then the Court quotes from that part of the opinion of a majority of the Ohio Court of Appeals (R. 75) where the Court in a dictum applied *Carpenter v. Denoon, supra,* a real property ejectment case, to the corporate stock in question. However, as Judge Sherick of that court pointed out in his dissent (R. 79), *Carpenter v. Denoon,* being a real property case, cannot apply to personal property.

But even if *Carpenter v. Denoon* could properly be applied to personal property in the State of Ohio, the Ohio Court of Appeals *does not announce what the law is of Massachusetts or of New York* on the question of acceleration. The law of these states applies, it is submitted, because the wrongs in question were committed in these states, not in Ohio. That is, the corporation, in breach of its contractual obligation to plaintiffs, issued the stock *in New York* in such form as to enable the life tenant to dispose of it anywhere; she disposed of it in Massachusetts; and then in New York on November 4, 1929, after the life estate had been extinguished and the remainder had accelerated, the corporation, again in breach of its duty to plaintiffs, cancelled the evidence of their property interests, to their complete loss.

How, then, can the law of Ohio possibly apply?

The *Restatement of Conflict of Laws,* Sec. 378, *Comment b,* states the rule as follows:

> "Whether a particular harm which a plaintiff has sustained constitutes an injury for which he may recover compensation is determined by the law of the place of wrong."
>
> "The place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place." § 377 of *Res. of Conflict of Laws.*

15 *C. J. S.*, Sec. 12, p. 896:

"The *lex loci delicti* governs the substantial aspects of torts and determines whether a right of action in tort has been created and its extent."

5 *R. C. L.*, Sec. 11, p. 917:

"The broad, uncontroverted rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself, while the *lex fori* controls all that is connected merely with the remedy."

We submit this is the settled rule. *American Banana Co. v. United Fruit Co.* (1909) 213 U. S. 347; *Le Forest v. Tolman* (1875) 117 Mass. 109; *Whitford v. Panama R. R. Co.* (1861) 23 N. Y. 465.

The bill in the case at bar pleads that by the law of Massachusetts the conversion of the stock there by the life tenant accelerated the remainder. It was thus called to the court's attention that the complainants relied on the law of Massachusetts. It is submitted the law of that state should be applied, unless good and sufficient reasons can be given why it should not. Such reasons have not been given.

The law of Massachusetts should apply because we are concerned with the legal consequences of the tort of the life tenant in that state in 1929. Although respondent's issuance of the stock to the life tenant in New York in 1927, was in breach of its duty to plaintiffs, this breach alone would not have caused a loss, but for the life tenant's invasion of the petitioners' rights in Massachusetts in 1929. So the act actually precipitating the loss, occurred in the latter state in 1929. This is "the last event necessary" to cause the loss.

The life tenant and corporation are equally liable as joint tort-feasors, when the life tenant sells the property. *Lowry v. Bank* (1848), Chief Justice Taney's Decisions, p. 310, at 331.

The corporation's initial wrong continues to the time of the loss, and thus the two wrongs are joint; but the

locus of the joint wrong is the place of the life tenant's tort. *Washington R. Co. v. Hickey* (1897) 166 U. S. 521.

As above shown, the law of Massachusetts is clear.

If, however, it be the correct view, that, since respondent's own breaches of duty to plaintiff occurred in New York, therefore, the *locus* of defendant's wrongs is New York, then the law of New York would appear to apply.

However that may be, it is submitted it is immaterial, because the law of New York on acceleration appears to be the same as the law of Massachusetts, and the law generally, on this point.

In *Moores v. Wait* (1829) 3 Wendell 104, at 108, the court laid down the same principle as that followed in the Massachusetts cases, *supra,* that a limited estate is extinguished by the waste or conversion of its holder, and thereupon the estate in remainder or reversion at once vests in possession.

There is no reason for saying that the law of New York is at variance with the general rule, but every reason that it is in accord.

Acceleration of remainders is recognized in New York. *Purdy v. Hoyt* (1883) 92 N. Y. 446; *In re Christie's Estate* (1927) 225 N. Y. S. 777, 130 Misc. 774.

In a *Note* on *"Acceleration of Remainders"* in *Annotated Cases,* 1914 A., p. 856, the rule is stated thus:

> "* * * where the taking effect in possession of the ulterior devise or remainder is postponed only in order that a life estate may be given to a life tenant, on the failure or destruction of the life estate the rights of the second taker are accelerated although the prior donee is still alive * * *."

In support of this statement the *Note* in *Annotated Cases* cites the two New York cases of *Mowatt v. Carow* (1838) 7 Paige 328; and *Taylor v. Wendell* (1857) 4 Bradford 324.

The true rule—that followed in both Massachusetts and New York—is thus stated in 33 *American Jurisprudence*, p. 621:

> "One entitled to a life estate may repudiate that right and elect to claim the estate under some other, a different, or an adverse title, and if he does, the remainder is accelerated and the remainderman becomes just as fully entitled to the immediate possession as if the life tenant had died. By renunciation or repudiation of a life estate is meant such an unequivocal act of the life tenant as would destroy his claim as life tenant so that he could not thereafter assert it, and would accelerate and mature the remainder."

That this is the rule to be applied in the case at bar, is hardly debatable. For how could the life tenant more effectually renounce or repudiate the life estate than by selling to a holder for value without notice, the whole property wherein the life estate existed? By so selling it, the life estate is necessarily merged in the remainder and ceases to exist, because the lesser estate disappears in the greater. Note, 93 Am. St. Rep. p. 153.

This was the situation which respondent's initial breach of duty in 1927 precipitated in 1929, of which it was charged with full cognizance when the West certificate was presented to it for transfer in 1929. Since it was charged with knowledge of the merger of estates and of the consequent acceleration of the remainder, it was defendant's duty in 1929 to preserve and protect plaintiffs' property rights, not to cancel the evidence of their property rights, to their total loss.

It may be added, without elaboration, that the *social*, and *philosophical* approaches to the question of the effect of a wrongful sale by the life tenant of personal property, lead to the same undoubted conclusion, as the more legalistic approach here discussed.

CONCLUSION.

In this brief we do not discuss the rules which fix the *measure of recovery* in event that the remainder interests are accelerated, because the lower court, having denied acceleration, had no occasion for applying the rules.

In event this Court grants the Writ, the rules of damages will be fully given in the brief on the merits. The rules are well settled, and the pertinent data to which they apply are not in dispute.

Respectfully submitted,

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